

Fair Political Practices Commission
MEMORANDUM

To: Chairman Johnson, Commissioners Hodson, Huguenin, Leidigh, and Remy

From: Brian G. Lau, Commission Counsel
Scott Hallabrin, General Counsel

Subject: Adoption of Proposed Regulation 18420.1 – Expenditures by Governmental Agencies for Communications about a Ballot Measure.

Date: November 14, 2008

Proposed Commission Action and Staff Recommendation: Adopt proposed Regulation 18420.1 clarifying that a payment of public moneys by a governmental agency for a communication about a ballot measure is an expenditure unless the communication provides a fair and impartial presentation of facts.

Reason for Proposal: The Political Reform Act (the “Act”) defines the term “expenditure” as “a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment, unless it is clear from the surrounding circumstances that it is not made for a political purpose.” (Section 82025.) In other words, an expenditure is “any payment made for a political purpose.” (Regulation 18225.)

The term “independent expenditure” is defined as “an expenditure made by any person in connection with a communication which expressly advocates¹ the election or defeat of a clearly identified candidate or measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest² of the candidate or committee.” (Section 82031.) Thus, an independent expenditure is a more specific type of expenditure, and a subset of expenditures generally.

Interpreting the Act’s definition of expenditure, Regulation 18225(b) provides that the term “expenditure” includes payments “used for communications which expressly advocate ... the qualification, passage or defeat of a clearly identified ballot measure.” Citing Regulation 18225(b), the Sixth District Court of Appeal of California has stated that the Commission “defines expenditure as any payment ‘used for communications which *expressly advocates* ... the qualification, passage or defeat of a clearly identified ballot measure.’” (*Vargas v. City of*

¹ “A communication ‘expressly advocates’ the nomination, election or defeat of a candidate or the qualification, passage or defeat of a measure if it contains express words of advocacy such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot,’ ‘vote against,’ ‘defeat,’ ‘reject,’ ‘sign petitions for’ or otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election.” (Regulation 18225(b)(2).)

² Regulation 18225.7 defines the phrase “made at the behest of” as a payment “made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of.”

Salinas (2005) 135 Cal App. 4th 361, 383, review granted April 26, 2006, S140911, emphasis in original.) However, nothing in Regulation 18225(b) necessarily precludes payments made for communications not expressly advocating the qualification, passage or defeat of a ballot measure from the statutory definition of expenditure.

Under the plain language of the Act, the term expenditure encompasses all payments for a political purpose, and persons qualifying as a committee, pursuant to Section 82013³, must disclose all payments for a political purpose on required campaign statements. (See Sections 84200, et seq.)⁴ Moreover, Regulation 18420 expressly requires a governmental agency making expenditures or contributions to file campaign statements if the agency qualifies as a committee. Accordingly, Regulation 18225(b) only clarifies that the term “expenditure” includes payments for communications that contain express advocacy. If a governmental agency otherwise qualifies as a committee, Regulation 18225(b) should not be construed to exempt a payment by the agency for communications about a ballot measure from the Act’s reporting requirements, even if the communications avoid express advocacy.

Furthermore, the Commission’s interpretation of Section 82025 provided in Regulation 18225(b) may also impact Government Code Section 8314. A provision outside the Act, Section 8314 prohibits elected state or local officers, including state or local appointees, employees, or consultants, from using or permitting others to use public resources for campaign activity. As defined in Section 8314(a)(2), “campaign activity” is any activity that is a contribution or expenditure under Sections 82015 and 82025 of the Act. However, Staff does not think Regulation 18225(b) was intended to limit the definition of expenditure provided in Section 82025 when a payment is made by a governmental agency for communications about a ballot measure. Staff believes that the adoption of Regulation 18420.1 will clarify this point.

This regulation is particularly timely because the California Supreme Court has granted review of the *Vargas* decision and the matter has been pending before the Supreme Court for nearly two years. While the limitations on the use of public moneys for campaign activities remain unclear⁵, clarifying the Commission’s definition for the term expenditure at this time will help prevent future misinterpretations of Regulation 18225.

Summary of Proposed Actions: Staff is recommending language to clarify that a payment of public moneys by a governmental agency for a communication about a ballot measure is an expenditure, or in other words a payment made for a political purpose, unless the communication

³ Section 82013 defines “committee” as any person or combination of persons who, in a calendar year, directly or indirectly receives contributions totaling \$1,000 or more, makes independent expenditures totaling \$1,000 or more, or makes contributions totaling \$10,000 or more to or at the behest of candidates or committees.

⁴ A committee filing a required campaign statement must provide “[t]he total amount of expenditures made during the period covered by the campaign statement and the total cumulative amount of expenditures made.” (Section 84211(b).)

⁵ The California Supreme Court previously distinguished between the appropriate use of public moneys to provide the public a fair and impartial presentation of facts relating to a ballot measure and the unlawful use of public moneys by a governmental agency to take sides in a ballot measure campaign. (*Stanson v. Mott* (1976) 17 Cal.3d 206.) The “fair and impartial” standard is incorporated in subdivision (d) of Section 8314.

provides a fair and impartial presentation of facts, as provided in case law and Section 8314 (see Footnote 5). Staff further recommends language to define when a “communication is about a ballot measure.” As proposed, the draft language provides that a communication is about a ballot measure if it clearly identifies a measure as defined in Regulation 18225(b)(1)(C) or (D).⁶

In response to concerns raised during the prenotice discussion of this proposal at the October 2008, Commission Meeting, staff proposes additional language clearly limiting the regulation to communications directed at the voters and providing exceptions for communications that are internal in nature or expressly required or permitted by law.

Attachments:

- 1 – Proposed Regulation 18420.1**
- 2 – Government Code Section 82025**
- 3 – Regulation 18225**

⁶ In pertinent part, Regulation 18225(b)(1) provides:

“(C) A measure that has qualified to be placed on the ballot is clearly identified if the communication states a proposition number, official title or popular name associated with the measure. In addition, the measure is clearly identified if the communication refers to the subject matter of the measure and either states that the measure is before the people for a vote or, taken as a whole and in context, unambiguously refers to the measure.

“(D) A measure that has not qualified to be placed on the ballot is clearly identified if the communication refers to the subject matter of the measure and to the qualification drive.”